48A C.J.S. Judges § 313

Corpus Juris Secundum | August 2023 Update

Judges
Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

D. Objections to Judge and Proceedings Thereon

2. Mode and Sufficiency of Raising Objection

a. General Considerations

§ 313. Form and content of disqualification application

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Judges 51(3)

Usually, a motion to disqualify a judge must be in writing. An affidavit or application for change of judge should set forth some ground of disqualification and the facts on which it is based.

Generally, a motion to disqualify a judge must be in writing[1] although it has also been held that an oral motion may be recognized.[2] With some exceptions,[3] it may be required that the motion or petition be supported by affidavit,[4] by declaration,[5] or by oral statement, under oath.[6] Under some statutes, the motion must be supported by additional corroborating affidavits of disinterested reputable persons.[7] Under other statutes, providing for a limited number of peremptory challenges to disqualify a judge, the only prerequisite for granting a change of judge is a timely application, and supporting affidavits are not required.[8]

Although it has been held that the affidavit for disqualification should be strictly construed,[9] an affidavit which substantially conforms to the statute may be sufficient.[10] An affidavit is insufficient where it fails to set out the name of the judge against whom the challenge is directed[11] or fails to put the judge on notice that the movant is seeking recusal.[12]

While under some statutes a motion for change of judge need not allege any cause for change,[13] generally speaking, the affidavit or application for change of judge should set forth some ground of disqualification.[14] It has been said in this regard that a motion to disqualify a judge must show that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge or that the judge is either an interested party to the matter, related to an

interested party, related to counsel, or a material witness for or against one of the parties to the cause.[15] Moreover, the application or affidavit should disclose the facts on which the disqualification is based,[16] from which facts the claimed disqualification appears probable, that is, from which facts the disqualification appears to follow as a conclusion of law.[17] The application or affidavit should not present mere conclusions.[18] It has been held that the statement must be positive and not on information or belief;[19] however, an affidavit for disqualification of a judge has been held not defective when based on the party's best knowledge, information, and belief.[20]

In some jurisdictions, allegations as to truth and good faith are necessary in order to obtain the disqualification of a judge,[21] but such allegations are unnecessary to obtain disqualification of a judge in a criminal case.[22] Where interest is asserted as the reason for recusing the trial judge, the application cannot be supported by merely showing grounds for prejudice.[23] It must be made clearly to appear that the disqualification is a present subsisting one.[24] The affidavit must show that the objecting party is a party in interest[25] unless the record already shows such party to be such.[26] An affidavit limiting the disqualification to matters to be heard on motion before trial does not disqualify the judge from presiding at the trial.[27]

It has been held that an affidavit to disqualify a judge on the basis of relationship must state the degree of such asserted relationship.[28] On the other hand, it has been stated that an affidavit is not required to notify a judge of the judge's relationship to a party[29] and that, where such relationship is pointed out in a sworn answer and admitted by general demurrer thereto, the general demurrer should not be sustained.[30]

Judge having been of counsel.

Where it is sought to disqualify a judge because of having been of counsel in the case, the affidavit need not allege that the judge was counsel before his or her election as judge,[31] and no allegation of prejudice is necessary.[32] However, the affidavit must in fact show that the judge was concerned with the subject matter of the present litigation.[33] An affidavit which does not disclose that the judge was attorney for a party to the litigation is insufficient.[34]

CUMULATIVE SUPPLEMENT

Cases:

No objective information contained in petitioner's motion to recuse was legally sufficient to support the standard for disqualification of a judge; petitioner's purported incidents of defamation and sabotage were tied to nothing, nothing in the record, nothing the judge said at a hearing, and nothing from anyone who heard a defamatory statement by judge, there was nothing improper about judge conferring with another judge with regard to a motion to transfer, and petitioner could not bootstrap his attempt to depose judge into a conflict that would force her recusal. West's F.S.A. R.Jud.Admin.Rule 2.330. Keitel v. Agostino, 162 So. 3d 88 (Fla. 4th DCA 2014).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Tyler v. State, 816 So. 2d 755 (Fla. 4th DCA 2002).

Ga.—Henry v. State, 265 Ga. 732, 462 S.E.2d 737 (1995).

Ill.—People v. Marshall, 256 Ill. App. 3d 310, 195 Ill. Dec. 756, 629 N.E.2d 64 (1st Dist. 1993).

Oral request insufficient
Ky.—Murray v. Com., 473 S.W.2d 150 (Ky. 1971).

2 Ariz.—Liston v. Butler, 4 Ariz. App. 460, 421 P.2d 542 (1966).

3 Ill.—People v. Oatis, 69 Ill. App. 3d 736, 26 Ill. Dec. 222, 387 N.E.2d 1052 (1st Dist. 1979).

Unequivocal certificate of disqualification
Alaska—Nelson v. Fitzgerald, 403 P.2d 677 (Alaska 1965).

Disqualification apparent from record itself
Haw.—Peters v. Jamieson, 48 Haw. 247, 397 P.2d 575 (1964).

4 U.S.—Youn v. Track, Inc., 324 F.3d 409, 55 Fed. R. Serv. 3d 611, 2003 FED App. 0087P (6th Cir. 2003); U.S. v. Enigwe, 155 F. Supp. 2d 365 (E.D. Pa. 2001).

Utah—Campbell, Maack & Sessions v. Debry, 2001 UT App 397, 38 P.3d 984 (Utah Ct. App. 2001).

Letter insufficient
Idaho—Goodrick v. State, 98 Idaho 124, 559 P.2d 303 (1977).

5 Cal.—People v. St. Andrew, 101 Cal. App. 3d 450, 161 Cal. Rptr. 634 (1st Dist. 1980).

6 Cal.—People v. Ashley, 59 Cal. 2d 339, 29 Cal. Rptr. 16, 379 P.2d 496 (1963).

7 Colo.—Austin v. City and County of Denver, 170 Colo. 448, 462 P.2d 600 (1969).

Fla.—State ex rel. Sagonias v. Bird, 67 So. 2d 678 (Fla. 1953).

Mo.—State v. Bryant, 24 S.W.2d 1008 (Mo. 1930).

8 Ill.—People v. Oatis, 69 Ill. App. 3d 736, 26 Ill. Dec. 222, 387 N.E.2d 1052 (1st Dist. 1979).

Mo.—Natural Bridge Development Co. v. St. Louis County Water Co., 563 S.W.2d 522 (Mo. Ct. App. 1978).

As to peremptory challenges, generally, see § 303.

9 U.S.—U.S. v. 16,000 Acres of Land, More or Less, in LaBette County, Kan., 49 F. Supp. 645 (D. Kan. 1942); Benedict v. Seiberling, 17 F.2d 831 (N.D. Ohio 1926).

Mo.—Erhart v. Todd, 325 S.W.2d 750 (Mo. 1959).

10 Ind.—Briscoe v. State, 180 Ind. App. 450, 388 N.E.2d 638 (1979).

Or.—State Capitol Reconstruction Commission v. McMahan, 160 Or. 83, 83 P.2d 482 (1938).

11 Cal.—People v. Kennedy, 256 Cal. App. 2d 755, 64 Cal. Rptr. 345 (4th Dist. 1967).

12 **Single sentence in mother's 21-page motion to reconsider**
Kan.—In re Marriage of Hutchison and Wray, 47 Kan. App. 2d 851, 281 P.3d 1126 (2012).

13 Ind.—Briscoe v. State, 180 Ind. App. 450, 388 N.E.2d 638 (1979).

14 Idaho—McPheters v. Maile, 138 Idaho 391, 64 P.3d 317 (2003).

Ill.—People v. Ganci, 57 Ill. App. 3d 234, 14 Ill. Dec. 798, 372 N.E.2d 1077 (1st Dist. 1978).

La.—State v. Neely, 3 So. 3d 532 (La. Ct. App. 5th Cir. 2008), writ denied, 21 So. 3d 272 (La. 2009).

15 Fla.—Minaya v. State, 118 So. 3d 926 (Fla. 5th DCA 2013).

16 U.S.—Obert v. Republic Western Ins. Co., 190 F. Supp. 2d 279 (D.R.I. 2002).

Idaho—McPheters v. Maile, 138 Idaho 391, 64 P.3d 317 (2003).

Ind.—Indiana Suburban Sewers, Inc. v. American Fletcher Nat. Bank & Trust Co., 261 Ind. 544, 307 N.E.2d 455 (1974).

Bias inadequately asserted by statement of "perceived animus"
U.S.—Ullmo ex rel. Ullmo v. Gilmour Academy, 273 F.3d 671, 159 Ed. Law Rep. 521, 2001 FED App. 0416P (6th Cir. 2001).

17 Cal.—Shakin v. Board of Medical Examiners, 254 Cal. App. 2d 102, 62 Cal. Rptr. 274, 23 A.L.R.3d 1398 (2d Dist. 1967).

18 U.S.—Lease v. Fishel, 712 F. Supp. 2d 359 (M.D. Pa. 2010), aff'd, 2010 WL 4318833 (M.D. Pa. 2010).

Colo.—Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008).

La.—State v. Gatewood, 103 So. 3d 627 (La. Ct. App. 5th Cir. 2012).

19 Ark.—Davis v. Atkinson, 75 Ark. 300, 87 S.W. 432 (1905).

As to affidavit based on information and belief where ground of disqualification is bias or prejudice, see §§ 320 to 323.

Best knowledge and belief insufficient
Mo.—Kelch v. Kelch, 462 S.W.2d 161 (Mo. Ct. App. 1970).

20 Mo.—State ex rel. McNary v. Jones, 472 S.W.2d 637 (Mo. Ct. App. 1971).

21 Mo.—State ex rel. McNary v. Jones, 472 S.W.2d 637 (Mo. Ct. App. 1971).

Or.—State ex rel. Yraguen v. Dorroh, 270 Or. 834, 530 P.2d 29 (1974).

22 Mo.—State ex rel. McNary v. Jones, 472 S.W.2d 637 (Mo. Ct. App. 1971).

23 La.—State, Dept. of Highways v. McDonald, 329 So. 2d 898 (La. Ct. App. 2d Cir. 1976).

24 S.C.—Ehrhardt v. Breeland, 57 S.C. 142, 35 S.E. 537 (1900).

25 U.S.—De Ran v. Killits, 8 F.2d 840, 4 Ohio L. Abs. 273 (C.C.A. 6th Cir. 1925).

26 Mo.—State ex rel. Morris v. Montgomery, 160 Mo. App. 724, 142 S.W. 474 (1912).

27 La.—Barham v. Barham, 337 So. 2d 289 (La. Ct. App. 2d Cir. 1976), writ refused, 340 So. 2d 315 (La. 1976).

Minn.—Locksted v. Locksted, 206 Minn. 525, 289 N.W. 55 (1939).

28 Ky.—Salisbury v. Com., 556 S.W.2d 922 (Ky. Ct. App. 1977).

29 Tex.—Stephenson v. Kirkham, 297 S.W. 265 (Tex. Civ. App. San Antonio 1927), writ refused, (Nov. 2, 1927).

30 Tex.—Stephenson v. Kirkham, 297 S.W. 265 (Tex. Civ. App. San Antonio 1927), writ refused, (Nov. 2, 1927).

31 Ind.—Witter v. Taylor, 7 Ind. 110, 1855 WL 3634 (1855).

32 Or.—In re Rights to Use of Waters of Owyhee River and its Tributaries, 137 Or. 243, 1 P.2d 1097 (1931).

33 Colo.—Board of County Com'rs of Pitkin County v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (App. 1970).

34 Cal.—O.A. Graybeal Co. v. Cook, 16 Cal. App. 2d 231, 60 P.2d 525 (3d Dist. 1936).

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